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No. 95-968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARK EINZIGER,

Petitioner,

vs.

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK, and KENNETH JACOBS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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Two points in Respondents' Brief in Opposition require a brief reply.

First, Respondents argue at pp. 8 *et seq*. that there was no proof that they controlled the prior litigation before the arbitrators and the New Jersey courts. This argument is an imposition on this Court for the following reasons.

(a) Stacey Allison was insolvent and had neither funds to pay an attorney nor assets to protect. Hence it had no reason or ability to defend itself.

(b) At no time during the course of this entire litigation have Respondents denied that they paid for and controlled the litigation.

(c) Respondents had an interest in controlling the prior litigation because they believed that a victory in the arbitration would constitute a defense in this action.

(d) Even if some mysterious entity or person other than Respondents had paid for the prior litigation, evidence of Respondents' control is overwhelming. Thus, they had the attorneys ostensibly representing Stacey Allison oppose and attack in the courts an interim order by the arbitrators requiring the Respondents to post a bond to secure any award even though Stacey Allison had no interest in the issue and, indeed, would have been benefited by the posting of the bond if it had had any assets. In addition, after the final arbitration award, the attorneys for Stacey Allison addressed a letter to the New Jersey Superior Court considering confirmation of the award arguing that any order entered by that court should not contain any language from which it could be inferred that Respondents were bound by the award. No clearer example of the shareholders preferring themselves and their interests over that of Stacey Allison could be imagined.

This evidence was in the record and expressly called to the attention of the Court of Appeals for the Third Circuit. That court, however, refused to follow the settled law established by this Court.

Second, building on their claimed lack of participation in the prior litigation, Respondents argue at pages 12-13 of their Brief that there is no special reason for the exercise of this Court's jurisdiction. On the contrary, there exists no better reason for the exercise of this Court's jurisdiction than to ensure uniformity in the federal law and to correct decisions of the lower courts that flout that uniformity.

Although at pages 9-11 of their Brief Respondents discuss and attempt to distinguish nearly all of the cases cited in the

Petition, they do not cite one case in which a non-party who participated in any way in a prior litigation was not held to be bound by the result of that litigation. One case so holding would be worth more than all of the nit-picking distinctions of the cases cited by Petitioner, but Respondents could not find one. Nor, in spite of their argument at pp. 13-15 of their Brief that state law applies, do they cite one state decision in support of their position. Hence, the rule that such non-parties are bound is uniform among the cases decided by this Court, the prior cases decided by the Court of Appeals for the Third Circuit, the cases decided by the other courts of appeals, and the state courts.

Respondents appear to think that the aberration exposed in this case is not worthy of this Court's attention because neither the district court nor the court of appeals published an opinion (see pp. 8-9 of their Brief). They even gratuitously cite a text telling this Court what it should do. The failure to write an opinion, however, is what makes the action of the court of appeals so insidious. Litigants can to some extent protect themselves from published opinions that do not follow the law — at least they are warned. Where a decision which flatly contradicts the rulings of this Court is unpublished, however, litigants have no way of predicting what the courts will do.

The tens of thousands of litigants who are parties to actions in the federal courts each year, no matter what the issues in their cases or the basis for federal jurisdiction, are entitled to assume that the courts will follow the law propounded by this Court. If the lower courts fail to do so and cover up those failures by deciding cases without opinion, these litigants cannot intelligently evaluate their rights.

This case provides a perfect example. It became clear almost from the beginning of the arbitration that Stacey Allison was insolvent. At that point, Petitioner could have saved time, legal expense, and disbursements by abandoning the arbitration and proceeding with this action. Respondents, however,

continued to defend the arbitration and Petitioner was not only required to pursue the case but also had the right to conclude on the basis of uniform prior law that Respondents would be liable for any award. The Court of Appeals for the Third Circuit, however, refusing to follow this Court, denied such liability. In so doing, they wasted nearly five years of the parties' time and money and utterly undermined any predictability in the law as well as the Constitutional authority of this Court.

The petition for a writ of certiorari should be granted.

Dated: January 23, 1996
New York, New York

Respectfully submitted,

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